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No. 85-1609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE HONORABLE ALCEE L. HASTINGS
United States District Judge, *et al.*,

Petitioners,

—v.—

THE HONORABLE JOHN C. GODBOLD, Chief Judge of the United States Court of Appeals for the Eleventh Circuit, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Court of Appeals' decision that it has original and exclusive jurisdiction to determine motions to enforce or quash subpoenas issued by an investigating committee, acting pursuant to 28 U.S.C. § 372(c), raise a question of federal law that has not been but should be settled by the Supreme Court?

2. Does the Court of Appeals' decision upholding the constitutionality of an investigating committee's ability, acting pursuant to 28 U.S.C. § 372(c), to investigate a complaint implicating the effective administration of the courts, hold hearings, and subpoena witnesses, raise a question of federal law that has not been but should be settled by the Supreme Court?

3. Does the Court of Appeals' decision that the privilege protecting communication among Judge Hastings and members of his staff is a qualified one and cannot be invoked in this case, raise a question of federal law that has not been but should be settled by the Supreme Court?

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STATEMENT OF CASE

On February 20, 1986, the United States Court of Appeals for the Eleventh Circuit (Campbell, Pell, Kearse, JJ., sitting by designation)[1] denied motions filed by Betty Ann Williams,

1 All of the active judges of the United States Court of Appeals for the Eleventh Circuit recused themselves, and the Chief Justice of the United States designated the Honorable Levin H. Campbell, Chief Judge of the United States Court of Appeals for the First Circuit; the Honorable Wilbur F. Pell, Jr., Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit; and the Honorable Amalya Lyle Kearse, Circuit Judge of the United States Court of Appeals for the Second Circuit, to sit as judges of the Eleventh Circuit for the purposes of these cases.

Judge Hastings' secretary, and by Alan Ehrlich, Daniel Simons and Jeffrey Miller, Judge Hastings' present and former law clerks, to quash subpoenas issued by the Investigating Committee of the Judicial Council of the Eleventh Circuit (the "Committee"). The Court of Appeals ordered Williams and Ehrlich to comply with the Committee's subpoenas by appearing at a time and place to be prescribed by the Committee and ordered Simons and Miller, who had previously appeared before the Committee and had declined to answer certain questions put to them, to testify fully as to all pertinent matters at a time and place to be prescribed by the Committee. At the same time, the United States Court of Appeals for the Eleventh Circuit affirmed a judgment of the United States District Court for the Southern District of Florida (Wilkins, J., sitting by designation)[2] dismissing for lack of subject matter jurisdiction an action brought by Ms. Williams, Mr. Ehrlich and Judge Hastings seeking injunctive, declaratory, and other relief with respect to the subpoenas issued and served upon Williams and Ehrlich. The decision of the Court of Appeals is reported as *In re Certain Complaints under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir. 1986), and the decision of the District Court is reported as *Williams v. Mercer*, 610 F. Supp. 169 (S.D. Fla. 1985).

On March 14, 1986, Judge Campbell entered an order staying the issuance of the Court of Appeals' mandate, to and including March 28, 1986, pending the filing of a petition for writ of certiorari, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of the Eleventh Circuit the certificate of the Clerk of the

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2 All of the active judges of the United States District Court for the Southern District of Florida recused themselves, and the Chief Justice of the Unites States designated the Honorable William W. Wilkins, Jr., Judge of the United States District Court for the District of South Carolina, to sit as a judge of the Southern District of Florida for the purposes of this case.

Supreme Court that the certiorari petition has been filed. Rule 41(b).

On March 28, 1986, counsel for Williams, Ehrlich and Judge Hastings filed a petition for writ of certiorari in this Court. On April 7, 1986, the Clerk of the United States Court of Appeals for the Eleventh Circuit received written notice by the office of the Clerk of the Supreme Court that a petition for certiorari had been filed.

The decision and orders entered below are contained in the Appendix filed in the Supreme Court with the petition for a writ of certiorari.

STATEMENT OF FACTS

1. The Initial Complaint and the Appointment of the Committee

On March 17, 1983, Wm. Terrell Hodges, Chief Judge of the Middle District of Florida and Anthony A. Alaimo, Chief Judge of the Southern District of Georgia, filed a verified written complaint with the Clerk of the United States Court of Appeals for the Eleventh Circuit, pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372 (the "Act"), and the Rule for the Conduct of Complaint Proceedings under 28 U.S.C. § 372(c), as promulgated by the Judicial Council of the Eleventh Circuit. The complaint alleged that Judge Hastings had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several canons of the Code of Judicial Conduct for United States Judges.[3]

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3 On December 29, 1981, Judge Hastings and William A. Borders, Jr. were charged, in an indictment returned by a grand jury in the Southern District of Florida, with conspiring to solicit and accept a bribe in exchange for influencing the outcome of a case pending before Judge Hastings. Borders' trial was severed and transferred to the Northern District of Georgia. On March 29, 1982, Borders was found

The complaining judges alleged that:

1. Judge Hastings had conspired with Borders to obtain a bribe in return for an official judicial act;

2. Judge Hastings made "public and unfounded statements" that the United States was prosecuting him on racial/political grounds;

3. Judge Hastings knowingly and publicly exploited his judicial position or acquiesced in such exploitation by others acting on his behalf by accepting financial donations from lawyers and other members of the public to defray the costs of his criminal defense;

4. Judge Hastings, by his own testimony, had allowed *ex parte* contacts between his law clerks and counsel in pending cases concerning substantive issues in those cases and concerning the content of orders and opinions not yet entered, and had "completely abdicated and delegated" his judicial decision-making authority to his law clerks;

5. Judge Hastings, by his own testimony, had told counsel in a judicial proceeding that he had read an important precedent when he knew he had not and explained his deception by implying that it was common for judges to make such deliberate misstatements;

6. Judge Hastings, by his own testimony, had exploited his judicial position by soliciting funds for someone he knew was a convicted federal offender.

The Complainants requested that the Chief Judge of the Eleventh Circuit together with any committee he may appoint pursuant to 28 U.S.C. § 372(c), the Judicial Council of the Eleventh Circuit, and the Judicial Conference of the United States make such investigations, conduct such hearings or

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guilty on four counts. On December 10, 1982, the Court of Appeals affirmed his conviction. On February 6, 1983, Judge Hastings was acquitted by a jury in the Southern District of Florida.

other proceedings, and make such orders as shall be necessary to vindicate the honor of United States Judges and to discipline Judge Hastings for his odious behavior. The Complainants asked that the disciplinary measures include, but not be limited to, the making of a recommendation to the House of Representatives that Judge Hastings be impeached according to the Constitution and laws of the United States.

On March 29, 1983, John C. Godbold, Chief Judge of the United States Court of Appeals for the Eleventh Circuit, entered an order appointing an investigating committee to investigate the facts and allegations contained in the complaint. The members of the Committee are Judge Godbold, Gerald B. Tjoflat, Circuit Judge; Frank M. Johnson, Jr., Circuit Judge; Sam C. Pointer, Jr., Chief Judge of the Northern District of Alabama; and William C. O'Kelley, District Judge of the Northern District of Georgia. The Committee is statutorily empowered and required to "conduct an investigation as extensive as it considers necessary, and [to] expeditiously file a comprehensive written report therein with the judicial council of the circuit." It is required to present both the findings of the investigation and the Committee's recommendations for necessary and appropriate action. 28 U.S.C. § 372(c)(5).

2. The Investigation Conducted by the Committee and the Challenges to its Authority by Judge Hastings

On June 3, 1983, the Committee began its investigation with the filing of a petition in the Southern District of Florida for access to the materials of the grand jury that had indicted Judge Hastings and William Borders as co-conspirators. The Committee had determined that it needed the materials in order to perform its statutory duty to make a complete and thorough investigation. The petition did not seek public disclosure of the materials.

On June 16, 1983, Judge Hastings appeared and filed in the public file of the District Court an answer and certain affirma-

tive defenses. He attached as part of an appendix a copy of the complaint against him which had led to the appointment of the Committee and which theretofore had been confidential. Only the fact that a complaint had been filed, and a committee appointed, had been theretofore disclosed by Judge Godbold.

All of the district judges for the Southern District of Florida recused themselves from presiding over the matter. Judge Eugene A. Gordon, Senior Judge of the United States District Court for the Middle District of North Carolina, was specially designated to sit as a judge of the Southern District of Florida for the purpose of this matter.

On December 19, 1983, the district court entered an order granting the petition and allowing the Committee access to the grand jury materials. *In re Petition to Inspect and Copy Grand Jury Materials*, 576 F. Supp. 1275 (S.D. Fla. 1983).

On December 29, 1983, Judge Hastings filed a Notice of Appeal. On February 3, 1984, a special panel of the Court of Appeals stayed the District Court's order and expedited the appeal.

On June 30, 1984, the Court of Appeals affirmed the district court's order granting the Committee's petition. *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984).

On August 24, 1984, Judge Hastings petitioned the Supreme Court for a writ of certiorari, which was denied on October 9, 1984. On October 16, 1984, Judge Hastings petitioned the Supreme Court for a rehearing. On November 5, 1984, the Supreme Court entered an order denying the petition for rehearing.

On December 23, 1983, Judge Hastings brought an action in the United States District Court for the District of Columbia, raising challenges to the constitutionality of the Act and the Committee's authority to conduct its investigation. The district court, the Honorable Gerhard A. Gesell presiding, rejected the

Committee's claim that the only issue ripe for review was whether it was constitutional for judges to investigate judges for conduct alleged to be prejudicial to the effective and efficient administration of the courts and held that it had the power to review the constitutionality of the Act itself.

Judge Gesell found that the Act represented a legitimate exercise of Congress' "necessary and proper" power by which Congress gave the courts reasonable means to put the judiciary's own house in order. The district court rejected various challenges to the Act's constitutionality asserted by Judge Hastings, including the following: that the Act's provision for recommending impeachment to the House of Representatives impinged on the exclusive power of Congress over impeachment; that because impeachment is the sole means of removing an Article III judge from office, other forms of discipline short of removing a judge from office are foreclosed; that the Act is unconstitutionally vague and violates due process; and, that the Act impermissibly combines investigative and adjudicatory power, so as to render impossible a fair adjudication.

As for Judge Hastings' particular concerns with the composition of the Committee and its actions, the district court held that these were not reviewable and required Judge Hastings to follow the statutory review process. *See* 28 U.S.C. § 372(c)(10). Finally, the district court held that it had no power to review the motives underlying Judge Godbold's order instituting the investigation. It held that 28 U.S.C. § 372(c)(10) did not permit review of that order by Judge Hastings' collateral lawsuit.

Judge Hastings appealed the district court's decision. On August 13, 1985, the United States Court of Appeals for the District of Columbia Circuit held that at the time the district court rendered its decision, adjudication of the constitutional issues was premature. The Court of Appeals pointed out that Judge Hastings' complaint touched matters of profound importance for the federal judicial system. However, the Court of Appeals held that such matters could be resolved only in an

appropriate adjudicatory setting. The court pointed out that, at that time, all that had happened was that an investigation under the Act had begun. The court, emphasizing the principle of constitutional avoidance, held that under the circumstances the constitutional issues were not ripe for decision.

3. Proceedings Before the Committee

On April 2, 1985, Judge Godbold notified Judge Hastings that the Committee would conduct proceedings in the matter of the complaints[4] filed against him, convening at 9:00 a.m., May 20, 1985, in courtroom 1906, 19th floor, Russell Building, 75 Spring Street, S.W., Atlanta, Georgia. Judge Hastings was notified as follows:

> As provided by § 372(c)(11) and paragraph 5(b) of Addendum Three of the Rules of the United States Court of Appeals for the Eleventh Circuit, you are afforded an opportunity to appear (in person or by counsel) at these proceedings to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing.
>
> Pursuant to § 372(c)(14) and paragraph 12 of Addendum Three, 'All papers, documents, and records of proceedings related to investigations conducted under [§ 372(c)] shall be confidential and shall not be disclosed by any person in any proceeding [with exceptions not here relevant].'

At approximately the same time, Judge Godbold also advised Judge Hastings as to the conduct of the proceedings, the

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4 A second complaint involving Judge Hastings was filed under the Act on September 26, 1984. By order of December 5, 1984, Chief Judge Godbold, acting pursuant to subsection (c)(4) of the Act, 28 U.S.C. § 372(c)(4), referred this second complaint to the Investigating Committee.

details of how the proceedings would be conducted and of his right to subpoena witnesses. This notice read as follows:

> The Investigating Committee wishes to give you the following information concerning the proceeding that will be conducted by it in Atlanta, Georgia commencing May 20, 1985. Previously, by notice dated April 2, 1985, the Committee has given you notice of the time, place and date of the proceeding.
>
> The proceeding is not a trial. Nor is it adversary or accusatory in nature. It is an investigatory administrative proceeding conducted for the purpose of investigating the facts and allegations contained in the complaint filed by Chief Judges William Terrell Hodges and Anthony A. Alaimo and the complaint filed by Thomas M. Tucker, and to conduct an investigation of matters germane to the conduct alleged in the complaints, all as extensive as the Committee considers necessary in the search for truth, and to file a comprehensive written report with the Judicial Council of the Circuit.
>
> The general sequence for the submission of evidence to the Committee will be that counsel for the Committee will tender first the evidence that he has marshalled. After Committee counsel has completed his tender, you may wish to tender evidence. The Committee may modify the order of presentation as appropriate for the needs of the Committee and participants. Counsel for the Committee will commence tendering evidence to the Committee on May 20 and continue thereafter for such period as is necessary. We estimate that you can expect to begin tendering evidence on May 27.
>
> You, and counsel for the Committee, may object to evidence tendered to the Committee, and the Committee through the presiding officer will rule thereon.
>
> By our notice to you of April 2, 1985 we already called to your attention that you are afforded an opportunity to

appear (in person or by counsel) at this proceeding, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing.

As provided by 28 U.S.C. § 372(c), all papers, documents, and records of the proceeding are confidential and shall not be disclosed by any person in any proceeding.

Office space has been set aside for you in room 2109 of the Russell Building. Telephone service, a typewriter, and a locking file cabinet will be available to you in room 2109. Use of a copier will be available.

When you have witnesses present a room will be provided for them separate from other witnesses.

The proceeding shall be under the control of the Committee. It shall determine the mode and the order of interrogating witnesses and of otherwise presenting evidence tendered to it. Testimony given before the Committee will be under oath or affirmation.

The Federal Rules of Evidence, and common law rules of evidence, will be utilized when in the judgment of the Committee they are appropriate.

Under § 372(c) the Committee has subpoena powers. If you wish subpoenas issued to compel the attendance of witnesses or the production of documents, you should supply their names and addresses to the Committee in writing. If you wish the government to be responsible for serving a subpoena to a witness and tendering to the witness fees and mileage as provided by Rule 45, F.R.Civ.P., you should furnish a summary of the evidence that you expect the witness to present. If you wish to be responsible for fees and mileage, the statement will not be required, and you will be responsible for service. The dates for the attendance of witnesses subpoenaed by you

can be coordinated by you or your counsel with counsel for the Committee.

If you have any questions about facilities or mechanical arrangements you should feel free to call Norman Zoller, Circuit Executive, who is in general charge or arrangements for the pro. :eding.

On May 16, 1985, Judge Hastings, through his counsel, Terence J. Anderson, filed a special and limited appearance before the Committee for the sole purpose of restating Judge Hastings' constitutional objection to the Committee's jurisdiction to take actions and conduct proceedings to investigate his conduct in office. Judge Hastings advised the Committee that he believed the Act was unconstitutional and that the Committee was acting improperly and without jurisdiction since its appointment and would be acting without authority in any proceedings it conducted on May 20, 1985, or thereafter. On the basis of that belief, Judge Hastings advised the Committee that neither he nor his counsel would appear at or participate in the proceedings.

A number of witnesses were subpoenaed to appear before the Committee at the proceedings which commenced on May 20, 1985. Certain witnesses declined to appear or, in some cases, appeared but declined to answer certain questions about what occurred in Judge Hastings' chambers. Betty Ann Williams, Judge Hastings' secretary was subpoenaed to appear and bring with her certain specified records maintained in Judge Hastings' chambers. She declined to appear. Several of Judge Hastings' present or former law clerks were subpoenaed to appear and give testimony. One clerk, Alan Ehrlich, declined to appear. Two other clerks, Jeffrey Miller and Daniel Simons, appeared but refused to answer any questions about what occurred in Judge Hastings' chambers while they were employed as law clerks.

With respect to these recalcitrant witnesses, the Committee filed appropriate motions with the Court of Appeals to compel

their testimony. Judge Hastings and the witnesses opposed the motion. Two of the witnesses and Judge Hastings also instituted an action in the United States District Court for the Southern District of Florida to enjoin the Committee's proceeding.

On May 20, 1985, Betty Ann Williams and Alan Ehrlich, as members of the official staff of Judge Hastings, and Judge Hastings filed in that court a complaint seeking injunctive and other relief. The complaint named as defendants Spencer Mercer, the Clerk of the Eleventh Circuit, and the five judges who are members of the Committee. The plaintiffs sought to challenge the validity and enforceability of the subpoenas issued under the seal of the Court of Appeals for the Eleventh Circuit at the request of the Committee. The plaintiffs moved for preliminary injunctive relief and the defendant members of the Committee moved to dismiss the complaint for want of subject matter jurisdiction.

On May 24, 1985, a hearing was held on the pending motions before United States District Judge William W. Wilkins, Jr. of the District of South Carolina, sitting by special designation. Following the hearing, Judge Wilkins filed a Memorandum Opinion dated May 24, 1985 in which he concluded that the District Court lacked jurisdiction over subpoenas issued by the Court of Appeals and ordered dismissal of the action. Judge Wilkins wrote:

> The Act [Judicial Councils Reform and Judicial Conduct and Disability Act of 1980] clearly confers authority to issue subpoenas only on the clerk of the court of appeals . . . . The court of appeals being the issuing body, it is therefore the appropriate body to which challenges to its subpoenas should first be made. A district court is without jurisdiction to entertain challenges to subpoenas issued pursuant to the Act without a specific reference from the court of appeals.

Williams v. Mercer, 610 F. Supp. 169, 170 (S.D. Fla. 1985). In the alternative, Judge Wilkins also considered the substance of

the plaintiffs' claims and found the claims to be "without merit" because the subpoenas "are . . . valid and enforceable." *Id.* at 170-171. Accordingly, Judge Wilkins ordered dismissal of plaintiffs' complaint, and plaintiffs appealed.

The Committee's pending motion to enforce its subpoenas and Judge Hastings' appeal from the district court's dismissal of his claims were set for oral argument on June 17, 1985, before the same panel of court of appeals judges who heard the appeal concerning access to the grand jury materials. On September 5, 1985, the Court of Appeals for the Eleventh Circuit directed the parties to file supplemental briefs on specific issues by 5:00 p.m. September 23, 1985. The issues were as follows:

> (1) In light of the recent opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings v. Judicial Conference*, No. 84-5576 (August 13, 1985), the nature and scope of the constitutional issues the court would need to determine before it could enforce the Committee's subpoenas to the witnesses in the instant case;
>
> (2) In light of the opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings*, *supra*, at p. 18, whether it has now become more appropriate for the court to reach the constitutional issues, and if so, what constitutional issues the court should address at this time;
>
> (3) Whether the court should decline to address the constitutional issues for reasons stated in the opinion of the Court of Appeals for the District of Columbia Circuit in *Hastings*, *supra*, (e.g., remoteness), or for any other constitutional issues the court should not address at this time.

4. The Decision of the Court of Appeals

On February 20, 1986, the Court of Appeals for the Eleventh Circuit issued an opinion holding that: (1) it had

exclusive original jurisdiction to determine motions to enforce or quash the subpoenas issued under its seal pursuant to the Act; (2) the Committee's statutory authority to conduct an investigation and subpoena witnesses does not violate separation of powers principles or unconstitutionally intrude upon the independence of an Article III judge; (3) the constitutional and technical objections to the Committee's issuance and service of subpoenas either were beyond the court's jurisdiction, could not properly be decided in the present proceedings, or lacked merit; and (4) the subpoenas were enforceable despite invocation of a privilege protecting communication among Judge Hastings and his staff.

In its opinion, the Court of Appeals pointed out that courts of appeals cannot be deemed powerless to protect the integrity of their process, and that the Act's goals of maintaining public confidence in the judiciary and promoting the effective administration of justice require that investigations into alleged judicial misconduct be concluded as expeditiously as is reasonably possible, lest a sitting Article III judge be compelled to function under a cloud of doubt and suspicion for any longer than is absolutely necessary.

As to the existence and investigative authority of the Committee, the Court of Appeals held that the Act did not impermissibly assign executive power, including the subpoena power, to judicial officers because the judiciary's ability to administer the business of the courts has been firmly established and is little doubted and the Committee is concerned solely with matters affecting the management, reputation and integrity of the judiciary itself. The court relied on the Supreme Court's decision in *Chandler v. Judicial Council*, 398 U.S. 74, 86 n.7, 90 S.Ct. 1648, 1654 n.7 (1970), which recognized the judicial council's ability, as an administrative body, to make "all necessary orders for the effective and expeditious administration of the business of the courts."

The Court of Appeals also held that the Committee's authority to conduct an investigation did not unconstitu-

tionally intrude upon the independence of a sitting Article III judge. The Court of Appeals again relied heavily on the *Chandler* case which approved of the judiciary's ability to "put its own house in order" and take reasonable measures to administer the courts. The court concluded that the complaint procedure established by the Act and the mechanism for investigating such complaints is reasonable and not overly threatening to judicial independence.

The Court of Appeals also addressed various remedial measures that the Committee might recommend and the judicial council could possibly adopt, including the authority to certify that grounds for impeachment may exist. The court concluded that, because some of the possible results of the investigation, including exoneration, were clearly constitutionally permissible, the Committee had the ability to conduct its investigation and subpoena witnesses. Any detailed consideration of the constitutionality of any particular remedy would have to await its possible imposition and a proper challenge by an affected party. The court did note that the Constitution's impeachment provisions do not require that the House of Representatives itself perform all preliminary investigatory functions that ultimately may inform its decision whether or not to impeach.

Having decided that the Committee may lawfully conduct an investigation into the complaint and subpoena witnesses, the court addressed the claims of Judge Hastings and members of his staff that their communications were protected by a privilege. As to Williams and Ehrlich, the court held that their claims of privilege were not ripe for decision because they had failed to appear before the Committee. Before a privilege may be asserted, it is necessary to make an appearance and decline to answer specific questions on the ground of the privilege. The Court of Appeals concluded that a qualified privilege governed the communications between a judge and his staff because "[l]ike any testimonial privilege, the judicial privilege must be harmonized with the principle that ' "the public . . . has a

right to every man's evidence." ' *United States v. Bryan*, 339 U.S. 323, 331 (1950)." *In re Certain Complaints*, 783 F.2d 1488, 1521 (11th Cir. 1986). The court assessed the claim of privilege as to the documentary evidence Williams had been asked to produce and concluded that no showing had been made that the documents contained confidential communications. As to the testimony of Miller and Simons, the court held that the Committee met its burden of showing "the importance of the inquiry for which the privileged information is sought; the relevance of that information to its inquiry; and the difficulty of obtaining the desired information through alternative means." *Id.* at 1522.

The Court of Appeals then weighed the Committee's demonstrated need for the information against the degree of intrusion upon the confidentiality of privileged communications necessary to satisfy that need and concluded that the judicial privilege was overridden by the Committee's need for the testimony of the law clerks to further its investigation.

It is this decision of the Court of Appeals for the Eleventh Circuit that Judge Hastings now seeks to have reviewed by the Supreme Court.

5. The Petition for Certiorari

On March 28, 1986, a petition for certiorari was filed in this Court. The petition presents three questions, each of which relates to whether the Court of Appeals properly directed the witnesses before the Committee to obey the command of subpoena and testify fully before the Committee.

REASONS FOR DENYING THE WRIT

1. The Decision of the Court of Appeals Raises No Questions of Federal Law which Have Not Been but Should Be Settled by the Supreme Court.

a. *The Court of Appeals' decision that it has original and exclusive jurisdiction to determine motions to enforce or quash subpoenas issued by an investigating committee, acting pursuant to 28 U.S.C. § 372(c), does not raise a question of federal law that has not been but should be settled by the Supreme Court.*

The Court of Appeals held that it had original and exclusive subject matter jurisdiction to enforce or quash the Committee's subpoenas. It concluded that the pattern and wording of 28 U.S.C. § 332(d)(1) indicate that Congress intended a court of appeals, as the tribunal issuing the subpoena, to adjudicate a motion to enforce or quash a subpoena. The court noted that Congress was acting against a backdrop of similar provisions in the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure governing the issuance and enforcement of subpoenas in civil and criminal litigation. *See* Fed. R. Civ. P. 45 and Fed. R. Crim. P. 17. Under those rules, the seal of the issuing court serves not merely to "authenticate" the subpoena in the eyes of the person served but to carry with it the court's authority. The Eleventh Circuit wrote:

> Once that authority is invoked by service of the subpoena, the court under whose seal the subpoena was issued must have jurisdiction to enforce its subpoena and vindicate its own process, as Fed. R. Civ. P. 45(f) and Fed. R. Crim. P. 17(g) recognize. The courts of appeals cannot be deemed powerless to protect the integrity of their process. Appendix 27-28.

The court then held:

> [W]e find the terms of section 332(d)(1) sufficiently clear to confer original jursdiction on this court to en-

> force judicial council subpoenas issued under its seal (citation and footnote omitted). Appendix 29.
>
> By the same token, we think the jurisdiction of the courts of appeals to enforce judicial council subpoenas is exclusive. There is nothing in the Act to suggest concurrent enforcement jurisdiction in both the courts of appeals and the district courts. Nor is this court aware of any precedent for such a concurrent arrangement, or for the novel proposition that the district court may assert jurisdiction to enforce or quash subpoenas issued by another court. Appendix 31-32.

Contrary to Judge Hastings' contention, there is nothing inconsistent with federal court procedures in this ruling.

b. The Court of Appeals' decision upholding the constitutionality of an investigating committee's ability, acting pursuant to 28 U.S.C. § 372(c), to investigate a complaint implicating the effective administration of the courts, hold hearings, and subpoena witnesses, does not raise a question of federal law that has not been but should be settled by the Supreme Court.

The Court of Appeals' decision upholding the Committee's power to conduct proceedings and subpoena witnesses raises no questions of federal law which have not been but should be settled by the Supreme Court. Congress has clearly authorized the circuit judicial council to appoint a committee to investigate complaints and utilize the subpoena power in conducting its investigation. This procedure is consistent with the long-established inherent power of circuit judicial councils to effectively and expeditiously administer the business of the courts. The Supreme Court's opinion in *Chandler v. Judicial Council*, 398 U.S. 74 (1970), leaves little doubt that the Constitution does not prohibit Congress from vesting within the circuit judicial councils the power to manage and administer the business of the courts. The ability to hold hearings and subpoena witnesses is a necessary component of this power.

The Court of Appeals relied heavily on *Chandler* and correctly applied the reasoning of that decision to this case.

Judge Hastings argues that the Committee's investigation represents a dramatic departure from the accepted and usual course of judicial proceedings established over the past two hundred years. On the contrary, an analysis of historical events supports the Court of Appeals' conclusion that Congress may lawfully authorize the judiciary to investigate complaints implicating the effective administration of the courts.

At common law in England, judges were subject to sanctions despite the protection of tenure during good behavior. Within the first five years of the enactment of the Constitution, Congress prescribed the numbers of judges and their residences, precluded judges from participating in any case in which they had an interest in the litigation, prohibited their practice of law, and enacted a criminal statute which provided that they should "forever be disqualified to hold any office of honour, trust or profit under the United States" upon conviction of bribery. 1 Stat. 117.

Congress has long authorized the judicial branch to monitor its own affairs. In 1789, Congress invested the judiciary with the power to "make and establish all necessary rules for the orderly conducting of business in the . . . courts." 1 Stat. 83 (1789). In the Administrative Office Act of 1939, Congress established judicial councils and empowered them to make "all necessary orders for the effective and expeditious administration of the business of the courts," 28 U.S.C. § 332. Since then, the judicial councils have undertaken to supervise the disposition of courts' dockets, control the assignment of judges, and determine whether judges should be certified as disabled under 28 U.S.C. § 372(b). Thus, Judge Hastings' thesis that two hundred years of history precludes implementation of a disciplinary procedure finds little support in English precedent, or in what has occurred within the judicial branch during the past two hundred years.

This Court's decision in *Chandler v. Judicial Council*, 398 U.S. 74, 90 S.Ct. 1648 (1970), makes clear that the Congress can authorize judicial councils to undertake investigations necessary to assure the "effective and expeditious administration of the business of the courts." Indeed, there can be little dispute over the ability of Congress to authorize the judiciary to investigate complaints implicating the administration of the courts.

Judge Hastings' contention that a peer review mechanism violates the separation of powers doctrine ignores the fact that by vesting the disciplinary machinery in the hands of the judiciary, Congress, while seeking to preserve its integrities, has safeguarded the inviolability of the judicial branch. The Act does not intrude upon the core function of the judiciary—deciding cases and controversies. Congress explicitly precluded review by the judiciary of complaints directly related to the merits of any ruling, 28 U.S.C. § 372(c) (3). Furthermore, under the Act the judiciary retains effective control of the complete disciplinary process.

c. ***The Court of Appeals' decision that the privilege protecting communication among Judge Hastings and members of his staff is a qualified one and cannot be invoked in this case does not raise a question of federal law that has not been but should be settled by the Supreme Court.***

The Court of Appeals' decision on the various claims of privilege asserted by Judge Hastings and members of his staff raises no questions of federal law which have not been but should be settled by the Supreme Court. The Court of Appeals carefully examined the claims of privilege asserted by Judge Hastings' secretary and present and former law clerks. Because Williams and Ehrlich failed to appear before the Committee, their claims of privilege were not ripe for consideration and raise no question of federal law. The court correctly held that there exists a qualified privilege protecting confidential communications among judges and their staffs in the performance

of their judicial duties. Although the court recognized the privilege, it ruled that the Committee was entitled to the documentary and testimonial evidence sought from Judge Hastings' staff members. Regarding appointment diaries, guest sign-in sheets, and telephone logs prepared by Judge Hastings' secretary and called for in the subpoena, the court ruled these were not protected from disclosure because there had been no showing that such documents would reveal confidential communications concerning official judicial business. The court's conclusion that the subpoena duces tecum served upon Williams did not call for privileged material is a fact-specific determination that raises no question of federal law. In addition, the Court of Appeals carefully weighed the Committee's need for law clerks Simons' and Miller's testimony and the general nature of Judge Hastings' confidentiality interest and determined that the subpoenas directed at Judge Hastings' law clerks were enforceable. The court's holding regarding Simons' and Miller's claim of privilege is a straightforward application of the Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090 (1974), and raises no question of federal law which has not been but should be settled by the Supreme Court.

2. The Petitioner's Arguments Directed to Various Remedial Measures Raise No Issue Ripe for Review.

Judge Hastings relies heavily on arguments directed to the constitutionality of various remedial measures the Judicial Council of the Eleventh Circuit may or may not ultimately adopt. These arguments raise no issue ripe for review. Such review, as the court of appeals properly recognized, must await a determination by the council and an action, if any, challenging such determination. Only at that time will there be a "concrete factual setting" for adjudication of any claim relating to sanctions under the Act. In this regard, the comments by the Court of Appeals in denying the Committee's application for an order vacating the stay are particularly appropriate. The court wrote:

> Our opinion, of which appellants seek review, deals with the interpretation and constitutionality of a new and obviously important statute, under which investigations of complaints against Article III judges and others may occur and are occurring. Many of the issues determined in our opinion are ones of first impression, of a kind that may deserve Supreme Court scrutiny at an appropriate time. Whether the Court will wish to review these matters at this time is another question. Our consideration of the challenged statute has occurred during the investigation phase of the complaint against Judge Hastings, before any determination of the complaint, and is in respect merely to the enforcement of the Committee's subpoenas to prospective witnesses. Our disposition of the issues at bar seems to us relatively straightforward. The Court may feel it should await a case decided at a more advanced stage of these or other investigatory proceedings, raising the thornier issues that may then be presented.

In re Certain Complaints Under Investigation by an Investigating Committee, ____ F.2d ____, No. 85-2054, slip op. 3, (11th Cir. May 2, 1986).

3. The Public Interest Requires that the Committee Complete its Investigation Expeditiously.

In conducting these proceedings, the Committee is performing its duty under a Congressional act that serves the public interest by ensuring the preserving an able, honorable, accountable, and independent judiciary. The Committee was designated on March 29, 1983—over three years ago. To the extent that the work of the Committee is further delayed, the Congressional purpose behind the Act is frustrated and the public interest, as indentified by Congress, suffers. The comments of Judge Gordon in earlier litigation between Judge Hastings and the Committee over grand jury records are pertinent:

> The public and Congressional interest in the effective administration of the act is compelling. The Act requires a full, fair, and timely investigation by the Committee so that public confidence in judicial integrity and credibility may be preserved. Society is entitled to have a mechanism that works to the end that innocent judges and magistrates are protected in their reputations and independence and that the judiciary is kept honorable and perceived to be so.

In re Petition to Inspect and Copy Grand Jury Materials, 576 F. Supp. 1275, 1282 (S.D. Fla. 1983) (footnote omitted), *aff'd*, 735 F.2d 1261 (11th Cir.), *cert. denied*, 105 S.Ct. 254 (1984). The Committee is required by the Act to proceed "expeditiously" in conducting its investigation and making its written report to the judicial council. Further delay will disrupt the procedure established by Congress for expeditiously resolving complaints under the Act.

CONCLUSION

The Court of Appeals for the Eleventh Circuit, in a unanimous, comprehensive, and well-reasoned opinion, concluded that the Constitution does not preclude the Congress from authorizing the judicial council, or its designate, the Committee, from investigating a complaint pursuant to the Act, and utilizing the subpoena power to compel the testimony of witnesses necessary to its investigation. The Committee has taken no action other than to conduct its investigations and subpoena witnesses. At this late date, there can be little doubt that the judicial council can lawfuliy hold hearings and take testimony in investigating a complaint. This case presents no issue of federal law which has not been but should be settled by the Supreme Court.

On the other hand, granting the petition for certiorari would mean a considerable further delay in the expeditious resolution of this matter, frustrating the Congressional purpose behind

the Act and the public's interest. As the *Statement of Facts* indicates, the necessity for the Committee to engage in protracted litigation merely to conduct its investigation has already delayed the resolution of this matter, to the detriment of the public and the participants.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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